IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DAVID A. BENTKOWSKI	)	CASE NO. CV 13 803270
	)	
Plaintiff	)	JUDGE NANCY A. FUERST
	)	
vs.	)	
	)	**REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT AS TO DEFENDANTS RICHARD DELL'AQUILA, RICHARD PIGNATIELLO, PATRICK DICHIRO AND CITY OF SEVEN HILLS, OHIO**
MATTHEW TRAFIS, et al,	)	
	)	
Defendants.	)	

Implicitly acknowledging that his claim cannot withstand Movants' Motion to Dismiss, Plaintiff attempts to shift gears in his opposition brief by arguing that he meant to allege a cause of action sounding in promissory estoppel. Specifically, Plaintiff argues that his Complaint should not be dismissed because Law Director Pignatiello and Assistant Law Director Pat DiChiro allegedly promised him that any information he provided in his request that the City charge others with a crime would forever remain confidential. (See Memorandum in Opp. at 4-6.) Plaintiff goes so far as to informally request leave to amend his Complaint. (*Id.* at 6). However, this last ditch effort to save his moribund Complaint fails, and any attempt to amend should be denied because it would be futile.

In addition, Plaintiff's opposition confirms that his real complaint is about the disclosure of the ***fact*** that he asked the police to investigate the individuals who were posting comments about him on the internet, and not about the disclosure of any "personal information" he provided to the police. Indeed, ***nowhere*** in the Complaint or in his opposition brief does he cite to any specific personal information that allegedly was disclosed in the police investigation file and is embarrassing to him. Instead, he is rightfully embarrassed by the publication of the ***fact*** that made a request that the City spend resources on a criminal investigation over the allegedly "harassing blogs" about him. Indeed, he does not allege that

the *Plain Dealer* published any "confidential facts" about him, but rather that the disclosure of the police investigative file caused the *Plain Dealer* to "publicize and criticize the Plaintiff's pursuit of the perpetrators of the crimes outlined hereinabove." (Complaint ¶ 114).

However, the ***fact*** that Plaintiff asked the City to investigate and to bring criminal charges against those who he believed were harassing him cannot support a claim under any theory. That Plaintiff filed a complaint with the police simply ***cannot be a private or confidential fact about him***. Nor could Plaintiff have relied on a promise that, if he filed a criminal complaint with the City, the fact that he filed a criminal complaint would forever be confidential. Indeed, how could the City ever pursue a criminal complaint against the alleged perpetrators if it did not include his identify as the victim of the crime in any information or indictment? As a member of the bar of Ohio, Plaintiff clearly knows better. For all these reasons, Plaintiff's Complaint should be dismissed as a matter of law.

a. **Plaintiff's Promissory Estoppel Theory Fails Because It Is Premised on Unenforceable Promises that Are Void as a Matter of Public Policy.**

Even if it had been pled in the Complaint, any putative claim sounding in promissory estoppel would fail as a matter of law because Plaintiff has not alleged that Law Director Pignatiello or Assistant Law Director DiChiro broke any alleged promise to him that could be enforced.[1] As a matter of law, there can be no enforceable promise by any government official to keep confidential any information that could be subject to Ohio's public records statute, R.C. 149.01 *et seq*. City officials have a clear duty to turn over public records, and there can be no enforceable promise that the City would not abide by the public records act.

"'Courts of law and courts of equity will decline to enforce obligations created by contract if the contract is illegal or the consideration given for it is illegal, immoral, or against public policy.'" *Dunn v.*

[1] "The elements of a claim for promissory estoppel are as follows: (1) a clear, unambiguous promise; (2) reliance upon the promise by the person to whom the promise is made; (3) the reliance is reasonable and foreseeable; and (4) the person claiming reliance is injured as a result of reliance on the promise." *Rucker v. Everen Secs*., Cuyahoga App. No. 81540, 2003-Ohio-1166, ¶24.

Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500 (7th Dist.) (quoting *Langer v. Langer*, 123 Ohio App.3d 348, 354, (2d. Dist. 1997)). "[P]ublic policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy." *Cincinnati City Sch. Dist. Bd. of Edn. v. Conners*, 132 Ohio St. 3d 468, 473, 2012-Ohio-2447 (internal quotations omitted).

The public policy in favor of disclosure of public records is well established in Ohio. The Supreme Court of Ohio has long recognized that "inherent in R.C. 149.43 is the fundamental policy of promoting open government, not restricting it." *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 171 (1997), citing *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 169 (1994). "Thus, the exceptions to disclosure are strictly construed . . . in order to promote this public policy." *Id.*; *State ex rel. Cincinnati Enquirer v. Jones–Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, paragraph two of the syllabus ("Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception."). Conversely, R.C. 149.43 must be liberally construed "in favor of broad access and resolve any doubt in favor of public records." *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs*., 120 Ohio St. 3d 372, 376, 2008-Ohio-6253, citing *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, ¶29.

Plaintiff seeks to avoid dismissal of his Complaint by arguing that the police investigatory file was not a public record under the confidential law enforcement investigatory record exception in the public records act, R.C. § 143.49(A)(2)(a, b and d). (Opposition at 7-9). This argument fails for a number of reasons.

First, Plaintiff produced no reasonably plausible argument that any of these exceptions apply here. He claims that he was the victim of a crime and that he requested the City to investigate and

prosecute those who purportedly were harassing him. However, there is no allegation in the Complaint that the police file includes any confidential sources or witnesses that were interviewed by the police (and in fact there are none). Accordingly, the exemptions in § 143.49(A)(2)(a and b) clearly do not apply. In addition, although Plaintiff alleges that he was "intimidated" by the on-line postings, there is no allegation in the Complaint that the disclosure of anything he told the police would "endanger his physical safety." And, again, Plaintiff obviously knew that his identity as the alleged victim of any crime would have been revealed if any prosecution would occur, so he cannot plausibly allege reliance on this exception to the public records statute.

Second, whether the police file was a public record or not begs the question. The public records statute does ***not prohibit*** a public body from disclosing documents that are not public records, and the police file is not confidential under R.C. § 1347.10. (See footnote no. 2 to the Movant's first brief). In addition, any alleged promise by a public body that a document provided to it would never become subject to mandatory disclosure under R.C. § 149.43 is not enforceable because it would be in violation of the well-established public policy espoused in Ohio's Public Records Act. Thus, any "promise" to this effect is void for public policy reasons.

Third, as explained above, what Plaintiff is really suing about is the disclosure of the fact that he filed criminal complaint, as opposed to any personal and confidential facts about him. It is absurd to even suggest that he could have relied on any promise that his identity as the individual requesting that the City prosecute those who were allegedly harassing him would forever be confidential.

Regardless of how Plaintiff couches his claim, he cannot seek damages for the breach of an invalid contract or unenforceable promise. As a result, to the extent that Plaintiff amended his Complaint to assert a claim for promissory estoppel, his Complaint would still fail as a matter of law.

b. **Plaintiff Has Failed to Allege that Movants Conspired to Release Information on a Wide-Scale Basis.**

In his opposition, Plaintiff also seems to suggest that the Movants are liable for some sort of common law conspiracy to disclose confidential information about him. Again, however, this is not pled in the Complaint. After discussing a series of plainly irrelevant and factually distinguishable cases,[2] Plaintiff argues that movants can be held liable for "conspiring to release private and confidential information about him and actually doing so." (Memorandum in Opp. at 17-18.) This argument also fails for a number of reasons.

First, as explained in Movant's initial brief in support of this motion, the common law "publicity tort" that Plaintiff relies upon requires a "public disclosure," i.e., "communicating the matter to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge as opposed to 'publication' as that term of art is used in connection with liability for defamation as meaning any communication by the defendant to a third person." *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App. 3d 163, 167 (Franklin Cty. 1985). Plaintiff only alleges that Movants provided the investigation file to two individuals who made public records requests. There is no allegation that the Movants disseminated any information to a wide range of individuals.

Second, the Complaint specifically does ***not*** allege that any of the Movants, including the City, are liable under Count IV, which alleges that ***other*** defendants conspired to publicize the information after it was disclosed in response to their public records requests. Law Director Pignatiello, Assistant Law Director DiChiro and Mayor Dell'Aquila are not named in Count IV, nor is there any respondent superior allegation against the City in Count IV (unlike Counts I, II and III). (See Compl. at Count IV, ¶¶100-119.) There is no allegation in the

[2] Plaintiff relies upon cases involving wholly inapplicable factual scenarios, including physician-patient confidentiality (see Memorandum at 11, citing *Biddle v. Warren Gen. Hosp.,* 86 Ohio St.3d 395 (1999)), accounting firm's unauthorized release of financial records (see Memorandum at 12, citing *Wagenheim v. Alexander Grant & Co.*, 19 Ohio App.3d 7 (10th Dist. 1983)), and employment information maintained in a personal information system (see Memorandum at 12-13, citing *Patrolman X v. City of Toledo*, 132 Ohio App.3d 374 (6th Dist. 1999)). Each of these cases is clearly distinguishable and simply do not bear on the case at hand.

Complaint that any of the Movants conspired with the other defendants or were involved in the publication of any information in the local newspapers, on social media websites, or otherwise.

Third, as noted above, regardless of whether the claim is styled as a tort or promissory estoppel, there can be no claim based on the City's disclosure of the fact that the Plaintiff requested that the City investigate and bring charges against those who he alleged were criminally harassing him. This simply is not a "private fact" about Plaintiff, and the Complaint points to no other "fact" about the Plaintiff that allegedly embarrassed him.

c. **The Complaint fails to allege any adverse employment action.**

Plaintiff does not even attempt to explain how his allegations against the City constitute an "adverse employment action" by the City. Even if he was an employee, there is no allegation of an adverse action affecting his status as an employee of the City.

Even more fundamentally, Plaintiff's argument that he was an employee of the City is refuted by the very definition he cites. Plaintiff claims he was an employee of the City solely due to his status as an elected official. (Opposition at 21). However, an elected official by definition does not "perform a service for wages or other remuneration for an employer." Counts II and III must be dismissed.

Conclusion

Defendants Richard Dell'Aquila, Richard Pignatiello, Patrick DiChiro and City of Seven Hills, Ohio respectfully request that this Court dismiss any and all of Plaintiff's claims asserted against them, award them costs and fees incurred in defending this action, and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent via ordinary U.S. mail on this 2nd day of August 2013 to:

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